Supreme Court of the United States

OCTOBER TERM, 1966.

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No. 898

W. H. YATES, and JOHN W. GARY,
Petitioners,

versus

HERBERT H. HODGES, and FRANCES A. HODGES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

BARNETT, MONTGOMERY, McCLINTOCK & CUNNINGHAM,
MALCOLM B. MONTGOMERY,
315-21 Barnett Building,
Jackson, Mississippi.

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HERBERT H. HODGES, and FRANCES A. HODGES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi, entered in the above entitled cause on July 8, 1966, and to review the judgment of said Court overruling the Suggestion of Error entered in the above entitled cause on September 27, 1966.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion rendered by the Chancery Court of the First Judicial District of Hinds County, Mississippi (R-506) is unreported but is print-

ed in Appendix B hereto at Page 19. The Opinions of the Supreme Court of Mississippi (R-532-566) are reported in *189 So. 2d 113*, but for the convenience of the Court are printed in Appendix B hereto at Pages 25 and 53. The Suggestion of Error is printed in Appendix B hereto at Page 64.

No opinion was delivered on the overruling of the Suggestion of Error (R-571) but a copy of the judgment overruling same is printed in Appendix B at Page 69.

JURISDICTIONAL STATEMENT.

The judgment or decree of the Chancery Court of the First Judicial District of Hinds County, Mississippi (R-513) was entered on July 8, 1965 and is printed in Appendix B hereto at Page 23. The unexpected judgment or decree of the Supreme Court of Mississippi was entered on July 8, 1966 (R-567) and is printed in Appendix B hereto at Page 62. The Suggestion of Error, raising the Federal Constitutional questions (R-568) was timely filed in the Supreme Court of Mississippi, on the 16th day of August, 1966, and is printed in Appendix B hereto at Page 64. The title, right, privilege or immunity under federal law was distinctly asserted defensively and the Order of the Supreme Court of Mississippi, overruling the Suggestion of Error was rendered on the 27th day of September, 1966, is printed in Appendix B hereto at Page 68. and is not based, in the alternative or otherwise, on an adequate and independent non federal ground. Review by this Court is sought to correct it to the ex-

tent that it incorrectly adjudged federal rights under the due process clause of the Fourteenth Amendment, and the power of this Court to correct this wrong judgment is hereby invoked under the provisions of 28 U. S., Section 1257(3) where Petitioners claim the denial to them of due process under the due process clause of the Fourteenth Amendment. Review by this Court is sought in order that Petitioners may be, by this Court, protected from a void judgment, rendered on a charge not made in the complaint, not raised as an issue by the pleadings, upon which the Petitioners were not summoned to defend against, did not litigate it, and could not litigate it, because proof in defense against it would have been irrelevant to any issue raised by the pleadings and incompetent and proof could not prevail in the absence of an allegation in the complaint specifically charging the ground as a cause of action on which plaintiffs sought recovery. Petitioners feel that the action of the Supreme Court of Mississippi, in rendering a judgment against them for $10,400.00 on a ground upon which they were not sued, a ground which was not raised by the pleadings, is a violation of the due process clause guaranteed to them by the Fourteenth Amendment and that their right thereasto has been infringed by the decree of the Supreme Court of the State of Mississippi. *Live Oak Ass'n. vs. Railroad Commission, 269 U. S. 354; Virginia vs. Imperial Coal Sales Co., 293 U. S. 15; Motlow vs. State ex rel Koeln, 295 U. S. 97; Dupasseur vs. Rochereau, 21 Wall 130.* Section 1257 (3) covers the entire range of federal questions that can arise in a law suit in a State Court

and the question here is urged as within the certiorari jurisdiction of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Is the judgment that was rendered against Petitioners by the Supreme Court of Mississippi a final judgment?

2. Did the Supreme Court of Mississippi, have jurisdiction to determine an issue not raised by the pleadings between the Complainants and petitioner Defendants thereon?

3. Did the determination by the Supreme Court of Mississippi of an issue not raised by the pleadings between Complainants and petitioning defendants, but was raised only between Complainants and a co-defendant, which issue the petitioning defendants were not summoned to defend and did not litigate, and on which the Supreme Court of Mississippi entered a final judgment against petitioning Defendants—did such judgment constitute a denial of the rights guaranteed by the due process clause of the Fourteenth Amendment?

4. Did the denial to petitioning Defendants of such due process by the Supreme Court of Mississippi, constitute a title, right or immunity within the meaning of Title 28 U. S. C., Section 1257 (3) providing that final judgments or decrees rendered by the highest Court of a State, in which a decision may be had, may be in such cases reviewed by the Supreme Court of the United States?

STATUTES AND REGULATIONS INVOLVED.

The Statutory provisions involved are Section 1284, Mississippi Code of 1942 (Recompiled) which is printed in the Appendix A hereto at Page 17; 28 U. S., Section 1257 (3) which is printed in the Appendix A hereto at Page 17; Amendment XIV, Section 1 of the Constitution of the United States that is printed in Appendix A hereto at Page 18.

STATEMENT OF FACTS.

This litigation concerns a final judgment entered by the Supreme Court of Mississippi, against Petitioners herein on an issue not raised by the pleadings between them and Complainants but raised by Petitioners' co defendant, State Stove Manufacturing Company, as an affirmative defense between it and Complainants. The decision awarding this judgment and overruling the Suggestion of Error therein is probably not in accord with decisions of this Court.

Yates and Gary, Petitioners, as contractors, contracted to erect a home for Complainants, according to the plans and specifications thereof and to deliver a lock and key job for a stipulated amount.

They purchased and installed a hot water heater, manufactured by State Stove Manufacturing Company. In doing so they installed a pressure relief valve in the cold water line of the heater, as required by the manufacturers' directions accompanying the

pressure relief valve and in a manner approved by the applicable building Safety Codes.

The tee was placed in the cold water line to the heater at a point just above where said cold water line entered the heater. Attached to this valve was a waste pipe and inside the valve was a spring, the tension of which could be set at a desired pressure, always less than that required to produce steam and when that pressure is reached the spring will contract and permit hot water from the tank to escape through the waste pipe and be replaced by cold water from the cold water supply line, and if the pressure in the tank exceeds the water pressure in the cold water line, the water will flow back into the supply water main and relieve the tank pressure.

A plastic dip tube is attached to the cold water line where it enters the tank and this tube conducts the cold water to the bottom of the tank where it is discharged, providing circulation of the water in the tank and maintaining a uniform temperature of the water in the tank.

Some six months after the home had been completed and occupied by the Complainants and during their absence from home the hot water heater exploded, destroying the house and much of the household effects.

Hodges and wife then filed an attachment suit in the Chancery Court of the First Judicial District of Hinds County, Mississippi, against State Stove Man-

ufacturing Company and against Yates and Gary, your Petitioners herein, and certain garnishees as co-defendants.

The Complainants charged that Yates and Gary negligently installed the pressure relief valve on the cold water line, when they knew or should have known that it would likely cause the heater to explode unless installed on the hot water side of the heater and the negligent installation on the cold water side was the proximate cause of the explosion.

As against the co-defendants, State Stove Manufacturing Company, the complaint charged that the water heater was unsafe and was negligently manufactured in an unsafe condition.

Yates and Gary denied that the placing of the valve on the cold water side of the heater was improper, denied that it was not a safe installation, and denied that such installation was the proximate cause of the injury.

State Stove Manufacturing Company denied that the heater was unsafe and affirmatively pleaded that accompanying the heater were directions for its installation that required the installation of a combination pressure relief and temperature valve in the hot water line and provided that failure to install such combination valve would void its warranty of the heater. Issue was made up thereon between Complainants and the Defendant, State Stove Manufacturing Company, by the pleadings between them but

the issue raised by the pleadings between the Complainants and the petitioning contractors remained solely on the cause of action for negligence in placing the pressure relief valve on the cold water side of the heater and nothing more.

Petitioning contractors were not summoned to defend against any other unplead cause of action, did not litigate any other cause of action and confined their proof to the issue so raised against them. Having proven by a preponderance of the evidence that the installation of the pressure relief valve on the cold water side of the heater met all the safety requirements of the applicable safety codes and of the common practices in the trade, the trial Court dismissed the complaint as to them and discharged them from all liability.

The Trial Court found, however, that State Stove Manufacturing Company was negligent in using a plastic tube that melted and closed the exit of hot water from the tank through the waste pipe and that safe construction required the use of a copper or metal dip tube that would not melt and gave judgment against State Stove Manufacturing Company for the damages resulting from the explosion.

State Stove Manufacturing Company appealed to the Supreme Court of Mississippi, and the Complainants took a cross appeal claiming the damages allowed to be inadequate and also took a direct appeal from the judgment dismissing the suit as to the petitioning contractors.

The Supreme Court of Mississippi, became confused as to what were the issues raised by the pleadings between the Complainants and petitioning contractors and the issues between Complainants and the co-defendant, State Stove Manufacturing Company, and held the petitioning contractors liable and entered final judgment against them for the sum of $10,400.00 on the issue that was raised only between Complainants and State Stove Manufacturing Company and not an issue raised by the pleadings between Complainants and petitioning contractors and held the contractors liable under the affirmative defense of State Stove Manufacturing Company that the explosion proximately resulted from the failure of the contractors to install a combination relief and temperature relief valve on the hot water side of the heater, when no such issue had been raised by the pleadings between Complainants and the petitioning defendant contractors. On the contrary the sole issue and the sole cause of action pleaded by Complainants against petitioners was that the proximate cause of the explosion was in not placing the pressure relief valve on the hot water side of the heater. This being the only cause of action charged in the complaint, it became and was the only cause of action the petitioning contractor defendants were summoned to defend against. It became the only issue raised by the pleadings and no evidence could be competent unless relevant to that issue. The petitioning contractor defendants were not called upon to litigate any other issue and did not do so.

When the Supreme Court of Mississippi entered judgment against petitioning contractors upon an issue not raised by the pleading between them and Complainants and upon which the Petitioners had not had their day in Court to be heard in defense of it, they timely filed a Suggestion of Error in the Supreme Court of Mississippi, raising the constitutional question of the deprivation of due process guaranteed by the Fourteenth Amendment but same was overruled by the Supreme Court of Mississippi, without rendering an opinion.

REASONS FOR GRANTING THE WRIT.

The decision of the Supreme Court of Mississippi, is in conflict with its own former decision in *Mississippi Power & Light Co. vs. Pitts, 179 So. 364,-365,* wherein the Court held:

> "The whole matter may be summed up in the statement that it is the pleadings and the developed facts within the pleadings that Courts are obliged to follow and to which the parties and Counsel must be held; not arguments."

The decision was also contrary to the Court's previous holding in *Wilson vs. Terry, 67 So. 2d 387,* wherein the Court held that a defendant is:

> "Bound to take notice only of the allegations, if any, against him in the original or amended declarations."

The decision of the Supreme Court of Mississippi is also in direct conflict with its former decision in *Rutland et al. vs. McIntosh, 121 Miss. 437, 83 So. 635,* holding that relief cannot be granted under a prayer for general relief when not supported by a specific allegation in the bill.

The decision by the Supreme Court of Mississippi, is also contrary to the decision of this, the highest Court of the land, in *Reynolds vs. Stockton (1891), 140 U. S., pp. 254, 266,* wherein it was held that:—

> "The rule is universal that where it appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as to determine matters which by the pleadings are put in issue."

The decision by the Supreme Court of Mississippi, in the instant case, is in direct conflict with the decision by the Court of Appeals (10th Cir.) in *Osage Oil & Refining Co. vs. Continental Oil Co., et al., 34 Fed. 2d 585, 588,* wherein it was held:—

> "Issues not raised by the pleadings cannot be determined."

The decision by the Supreme Court of Mississippi, awarding judgment on an issue not raised by the pleadings between Complainants and the Defendants against whom the judgment was rendered is in direct conflict with the decision rendered by the Court of Appeals (10th Cir.) in *United States vs. Goldstein, et al., 271 Fed. 838,* wherein it was held:—

"A judgment upon a matter not within the pleadings and not litigated is void, being contrary to fundamental principles of justice. Reynolds vs. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; Coe vs. Armour Fertilizer Works, 237 U. S. 413, 426; 35 Sup. Ct. 625, 59 L. Ed. 1027. A decree has to be founded on the allegata as well as the probata of the case. Putnam vs. Day, 89 U. S. (22 Wall) 60, 66 (22 L. Ed. 764; Hendrys vs. Perkins, 114 Fed. 801, 806, 52 CCA 435."

The decision rendered by the Supreme Court of Mississippi, and the judgment thereon beyond the issues raised by the pleadings is directly contrary to the decision of this High Court in *Coe vs. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. Rep. 625, 630,* where it was held:—

"In doing this, the Court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to the fundamental principles of justice."

The decision by the Supreme Court of Mississippi, and the judgment entered by it thereon is in direct conflict with the holding of the Court of Appeals (10th Cir.) in *Beach, Inc. vs. Koch, et al., 140 F. 2d 852, 861,* wherein it was held:—

"A party is no more entitled to recover upon a claim not pleaded than he is entitled to recover upon a claim pleaded but not proven."

The judgment rendered by the Supreme Court of Mississippi is a final judgment. The Supreme Court in its opinion said:—

> "As to the appeal of Mr. and Mrs. Hodges from the decree dismissing Yates and Gary, the decree is reversed and judgment rendered here adjudicating liability of Yates and Gary of damages to the house of $10,400.00, and as to them the cause is reversed and remanded for the limited purpose only of determining the quantum of such personal property damages." (R-532.)

From this language it is clear that definite disposition has been made by the Mississippi Supreme Court of all legal and factual issues in the case, so far as relates to the $10,400.00 judgment. No loose ends remain to be tied up. Liability has been determined finally and the amount of damages has been finally and irrevocably adjudicated. *Republic Natural Gas Co. vs. Oklahoma, 334 U. S. 62, 68; Bruce vs. Tobin, 245 U. S. 18; Mississippi Central R. R. Co. vs. Smith, 295 U. S. 718.* The judgment leaves nothing to be done. It is final.

The Supreme Court of Mississippi, has rendered judgment against these petitioners for $10,400.00 on an issue that was not within the pleadings, on an alleged cause of action that was not charged against them in the complaint and which judgment is void. *United States vs. Goldstein, 271 Fed. 838.* They are taking $10,400.00 from petitioners on an assumed cause of action that petitioners were not summoned

to answer or defend against. This was a violation of due process within the meaning of the Fourteenth Amendment and, though the question of due process, was not raised until the said Supreme Court had acted without it, yet there was no cause or justification for raising it until the Supreme Court of Mississippi made it necessary and appropriate that it be raised. The question was timely raised in the Supreme Court of Mississippi by Suggestion of Error which the Court overruled. Under such circumstances the Supreme Court of the United States has jurisdiction to review the judgment. *Grannis vs. Ordean, 234 U. S. 385; Saunders vs. Shaw, 244 U. S. 317.*

For this Court to be authorized to take jurisdiction and review this decision by certiorari, it seems that it is enough that the right, privilege or immunity under federal law be asserted defensively and that, as here, the State Court's decision passes upon the federal question and on no non federal ground and federal rights have been infringed by this State Court's decision. *Live Oak Assn. vs. Railroad Commission, 269 U. S. 354; Virginia vs. Imperial Coal Sales Co., 293 U. S. 15.*

It seems, therefore, that this decision, by the Supreme Court of Mississippi, is a final judgment, based solely on a federal ground and incorrectly decides those federal rights and this Court has power to correct this wrong judgment under the provisions of *28 U. S., Section 1257 (3).*

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BARNETT, MONTGOMERY, McCLINTOCK & CUNNINGHAM,

By MALCOLM B. MONTGOMERY,
315-21 Barnett Building,
Jackson, Mississippi.

CERTIFICATE OF SERVICE.

I, Malcolm B. Montgomery, Attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the date shown below, I served the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi, on Herbert H. Hodges and Frances A. Hodges, his wife, Respondents, by mailing a true copy thereof to Honorable W. H. Jolly, P. O. Box 743, Columbus, Mississippi, and to Honorable Dewitt T. Hicks, Jr., Threadgill and Hicks, P. O. Box 1094, Columbus, Mississippi, air mail, postage prepaid, by first class mail, Attorneys of record for said Respondents.

Dated this, the 21st day of December, 1966.

Malcolm B. Montgomery,
Attorney for Petitioners,
P. O. Box 1288,
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